

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

ALYCIA CARMICHAEL - MILAN

Plaintiff,

v.

GWEN SAILER, et al.,

Defendants.

No. C07-5091RBL

ORDER GRANTING  
SUMMARY JUDGMENT  
AND GRANTING  
MOTION FOR LEAVE TO  
AMEND

This matter is before the court on the Defendants' Motion for Summary Judgment [Dkt. #9], and Plaintiff's Motion for Leave to Amend her Complaint [Dkt. #13]

Plaintiff Carmichael -Milan is a former student at Bates Technical College. In March, 2006, Defendant Sailer, the school's Vice President of Student Services, suspended Plaintiff after she filed a student grievance against a nursing instructor. Plaintiff appealed, and the suspension was upheld by the Bates Technical College Student/Faculty Disciplinary Committee. She appealed again and the suspension was ultimately upheld by the school's President.

In her Complaint<sup>1</sup>, Plaintiff alleges she was denied her First Amendment and Due Process rights,

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<sup>1</sup>Plaintiff's Motion for Leave to Amend her Complaint, consistent with the court's resolution of Defendants' Summary Judgment Motions, is granted below.

1 and asserts claims under 42 U.S.C. §1983. The defendants are Sailer; Bates President David Borofsky,  
2 and the Chair of the Student/Faculty Disciplinary Committee, John Pearson.

3 All defendants move to dismiss Plaintiff's Due Process claim, which Plaintiff does not oppose.  
4  
5 Defendant Pearson moves to dismiss all claims against him, on the basis of Absolute and Qualified  
6 Immunity, and on the ground that Plaintiff cannot establish that he deprived her of any constitutional right.

### 7 **1. Factual Background**

8 Plaintiff Alycia Carmichael -Milan is a former Bates Technical College Practical Nursing student.  
9 In March 2006, she was suspended by Defendant Sailer, the school's Vice President of Student Services  
10 for misconduct. The suspension arose from a written grievance filed by Plaintiff against a teacher, for  
11 allegedly grabbing her.  
12

13 Plaintiff wrote: "[I]t is my desire to complete this nursing program and this letter is to advise the  
14 administration of Bates Technical College that further physical assault/battery, humiliation, name calling,  
15 demeaning remarks, unfair grading, mental and emotional abuse will no longer be tolerated without  
16 recourse. These acts are in direct violation of Washington State Law." [See Dkt. #12]. Plaintiff's  
17 grievance was viewed as disrespectful and intimidating by the School, and the School thought it showed  
18 that Plaintiff "might present an imminent danger." The School charged Plaintiff with making false charges  
19 and implied false charges against her instructor, and for using intimidating and disrespectful language. She  
20 also was charged with and for failing to comply with an instruction not to wear a sweatshirt over her  
21 "scrubs," and with making "mocking" remarks about the nursing Program during and interview with Vice  
22 President Sailer.  
23  
24

25 Plaintiff appealed her suspension to the College's Student/Faculty Disciplinary Committee, which  
26 held a hearing pursuant to WAC 495A-121-065. Plaintiff attended and was represented by counsel. The  
27 Committee unanimously affirmed the decision. Because the vote was unanimous, the head of the  
28 committee, Pearson, did not vote. He never met Plaintiff and had no interaction with her before or after

1 the hearing. As the Chair of the Committee, Pearson signed the Committee's decision.

2 Plaintiff appealed the Committee's decision to the School's President, who also upheld the  
3 suspension. Plaintiff has sued each of the administrators involved in her suspension, alleging deprivation of  
4 her constitutional rights to free speech and due process. Her complaint includes the allegation that she  
5 "engaged in protected speech activity" on three or more occasions, but does not provide the context or the  
6 content, other than the student grievance outlined above.  
7

8 Defendant Pearson argues that Plaintiff's claims against him must fail as a matter of law because (1)  
9 he is absolutely immune from liability because his role was that of a quasi judicial administrator; (2) that he  
10 is in any event qualifiedly immune and for any violation of Plaintiff's constitutional rights; and (3) he did  
11 not personally participate in any deprivation of Plaintiff's constitutional rights.  
12

### 13 **2. Summary Judgment Standard.**

14 Summary judgment is appropriate when, viewing the facts in the light most favorable to the  
15 nonmoving party, there is no genuine issue of material fact which would preclude summary judgment as a  
16 matter of law. Once the moving party has satisfied its burden, it is entitled to summary judgment if the  
17 non-moving party fails to present, by affidavits, depositions, answers to interrogatories, or admissions on  
18 file, "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317,  
19 324 (1986). "The mere existence of a scintilla of evidence in support of the non-moving party's position is  
20 not sufficient." *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9<sup>th</sup> Cir. 1995). Factual  
21 disputes whose resolution would not affect the outcome of the suit are irrelevant to the consideration of a  
22 motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In other  
23 words, "summary judgment should be granted where the nonmoving party fails to offer evidence from  
24 which a reasonable [fact finder] could return a [decision] in its favor." *Triton Energy*, 68 F.3d at 1220.  
25  
26  
27

### 28 **3. Plaintiffs' Due Process claims.**

Plaintiff has abandoned her due process claims against all defendants, instead seeking to Amend her

1 Complaint to “clarify the factual basis for her First Amendment Claim.” [See Dkt. #13 at 1]. She argues  
2 that her motion to amend her complaint to delete the due process claim makes the Defendants’ motion on  
3 that claim moot, and asks the court to dismiss it without prejudice. Defendants argue, correctly, that a  
4 Plaintiff may not voluntarily dismiss a claim without prejudice in the face of a motion for summary  
5 judgment. Fed. R. Civ. P. 41(a). Plaintiffs’ due process claims are therefore dismissed with prejudice.  
6

#### 7 8 **4. Plaintiffs’ First Amendment claims against John Pearson.**

9  
10 Plaintiff argues, in her complaint and her proposed amended complaint, that defendant Pearson  
11 deprived her of her First Amendment right to Free Speech by overseeing the disciplinary committee. She  
12 argues that Pearson personally participated in the deprivation of her rights for purposes of 42 U.S.C.  
13 §1982 and that he is not entitled to absolute or qualified immunity.

##### 14 **a. Absolute Immunity**

15  
16 Pearson argues that in acting as a quasi-judicial officer he is entitled to the same sort of absolute  
17 immunity as a judge, citing for example *Mishler v. Clift*, 191 F.3d 998, 1007 (9<sup>th</sup> Cir. 1999). In *Mischler*,  
18 the 9<sup>th</sup> Circuit discussed at some length the bases and the application of absolute immunity, discussing  
19 particularly the impact of the Supreme Court’s decision in *Butz v. Economou*, 438 U.S. 478 (1978). It  
20 stated in part: “It is well settled that judges and prosecutors are entitled to absolute immunity. . . . The  
21 essential rationale is that, without protection from retaliatory suits, a judge would lose “that independence  
22 without which no judiciary can be either respectable or useful.”  
23

24 It also explained that the important inquiry is not the position of the person claiming absolute  
25 immunity, but rather the function he or she is performing at the time. If the function is sufficiently akin to a  
26 judicial process, absolute immunity is granted. Six factors are used to judge this “functionally comparable”  
27 standard:  
28

(a) the need to assure that the individual can perform his functions without

1 harassment or intimidation; (b) the presence of safeguards that reduce the  
2 need for private damages actions as a means of controlling unconstitutional  
3 conduct; (c) insulation from political influence; (d) the importance of  
4 precedent; (e) the adversary nature of the process; and (f) the correctability  
5 of error on appeal.

6 *See Mishler*, 191 F.3d at 998; *see also Cleavinger v. Saxner*, 474 U.S. 93 (1985); *Wood v.*  
7 *Strickland*, 420 U.S. 308 (1975). If the proceeding at issue has these attributes, the presiding body is  
8 sufficiently quasi-judicial to be entitled to absolute immunity.

9 Plaintiff argues that participants in student disciplinary proceedings are entitled only to qualified,  
10 and not absolute, immunity. She cites *Hafer v. Melo*, 503 U.S. 21, 29 (1991), for the proposition that only  
11 a very limited class of individuals is entitled to absolute immunity. Plaintiff argues it is clear that school  
12 officials involved in student disciplinary proceedings at public schools are protected by qualified, and not  
13 absolute immunity. *Wood*; *Cleavinger*.

14 In *Wood*, the Supreme Court held that while it was adjudicative in nature, a school board  
15 disciplinary committee was not functioning in a sufficiently quasi-judicial manner to enjoy absolute  
16 immunity, and that qualified immunity afforded sufficient protection:

17  
18 Liability for damages for every action which is found subsequently to  
19 have been violative of a student's constitutional rights and to have  
20 caused compensable injury would unfairly impose upon the school  
21 decisionmaker the burden of mistakes made in good faith in the  
22 course of exercising his discretion within the scope of his official  
23 duties. School board members, among other duties, must judge  
24 whether there have been violations of school regulations and, if so,  
25 the appropriate sanctions for the violations. Denying any measure of  
26 immunity in these circumstances 'would contribute not to principled  
27 and fearless decision-making but to intimidation. . . .

28 But at the same time, the judgment implicit in this common-  
law development is that absolute immunity would not be  
justified since it would not sufficiently increase the ability of  
school officials to exercise their discretion in a forthright  
manner to warrant the absence of a remedy for students  
subjected to intentional or otherwise inexcusable  
deprivations.

1  
2       *See Wood* 420 U.S. at 320, 321.

3       Pearson emphasizes that the hearing was held pursuant to the Washington Administrative Code,  
4  
5 Plaintiff was entitled to and did have an attorney present at the hearing, and that Pearson's only role in the  
6 process was to preside over the hearing. He also emphasizes that he did not vote on Plaintiff's appeal, and  
7 that as a result the plaintiff cannot establish that he participated in any deprivation of Plaintiff's  
8 constitutional rights.

9       He claims that the function of the board was more like that of a judge than was the school board at  
10 issue in *Wood*, or the prison disciplinary committee at issue in *Cleavinger*. While some additional  
11 safeguards were in place in this case, and Pearson did not actually vote to uphold the suspension, the policy  
12 articulated in *Wood* (quoted above) persuades the court that Pearson is not entitled to absolute, judicial  
13 immunity.  
14

15       **b.     Qualified Immunity**

16       Qualified immunity protects "government officials ... from liability for civil damages insofar as their  
17 conduct does not violate clearly established statutory or constitutional rights of which a reasonable person  
18 would have known." *Harlow v. Fitzgerald*, 547 U.S. 800, 818 (1982). In *Saucier v. Katz*, 533 U.S. 194,  
19 201 (2001), the Supreme Court set out a two step inquiry in determining whether an official has qualified  
20 immunity. First, taken in the light most favorable to the party asserting the injury, do the facts show the  
21 officer's conduct violated a constitutional right? Second, the court must ask whether the right was clearly  
22 established. The relevant, dispositive inquiry in determining whether a right is clearly established is whether  
23 it would be clear to a reasonable [actor] his conduct was unlawful in the situation he confronted. *Id.*; *see*  
24 *also Phillips v. Hust*, 477 F.3d 1070, 1079 (9<sup>th</sup> Cir. 2007).  
25  
26

27       The first inquiry, then, is whether Plaintiff has for purposes of summary judgment demonstrated  
28 that she was deprived of a constitutional right. She argues that her grievance and subsequent conduct (not

1 specifically described by the parties) constituted protected free speech under the First Amendment, and that  
2 to suspend her on the basis of that speech was unconstitutional. She argues that the court cannot resolve  
3 facts on the qualified immunity issue, just as it cannot resolve factual questions of any other nature in the  
4 context of summary judgment, and that she is entitled to additional discovery before the court rules on the  
5 merits of the claim. Plaintiff does not, however, move for additional discovery under Rule 56(f), or  
6 describe what facts are left to be determined: the content of Plaintiff's speech is largely undisputed.

7  
8 Plaintiff characterizes her speech as an exercise in "the right to complain to public officials" and  
9 that her "efforts to attain redress for an alleged assault by a teacher is protected First Amendment activity."  
10 [See Dkt. #12 at 11.] Plaintiff also argues that her contention the speech is protected is not challenged by  
11 the defendants.

12  
13 She does not, however, explain how the First Amendment protects the words and conduct which  
14 were the subject of the School's disciplinary actions. She cites *United Mine Workers v. Illinois Bar*  
15 *Association*, 389 U.S. 217 (1969) for the undisputable proposition that "the right to complain and seek  
16 administrative relief are among the most precious of our civil liberties." She cites *Estate of Morris v.*  
17 *Daplito*, 297 F. Supp.2d 680 (S.D.N.Y. 2004) for the proposition that "a student's efforts to seek redress  
18 for an alleged assault by a teacher is a protected First Amendment activity." While these general  
19 statements are inherently true, nether case is analogous to the Plaintiff's case here.

20  
21 Plaintiff does not squarely address the words she actually used to complain and seek redress, and  
22 must concede that not all speech made in such efforts is necessarily protected. Her claims against Pearson  
23 relate to the decision of the Disciplinary Committee, which did more than suspend her for the content of  
24 her grievance. Additionally, it considered claims that she made intentionally false statements about her  
25 instructor, including particularly the claim that the instructor "assaulted" and "battered" her. It concluded  
26 that the statements were intimidating, disrespectful and untrue, and that they, along with the language used  
27 in Plaintiff's grievance, were intended to threaten and manipulate the administration of the College.  
28

1 It also found, separately, that Plaintiff had intentionally disregarded repeated instructions not to  
 2 wear sweatshirts over her scrubs, and had used threatening and intimidating language in a phone  
 3 conversation with Sailer. She was also found to have used sarcastic and mocking comments with regard to  
 4 the College Nursing Program and “displaying an alarming level of disrespect and disdain for the nursing  
 5 faculty, patients and medical staff.” The Disciplinary Committee concluded that taken together, the words  
 6 used “substantially threatened the educational process and other legitimate functions of the college, as well  
 7 as the health and safety of those at the school.” It specifically found that Plaintiff’s conduct violated WAC  
 8 495A-121-029 and -041. [See Dkt. #10; Decl of Pearson at Ex. 2]. As a result, the Committee voted (with  
 9 Pearson abstaining) to uphold the suspension.  
 10  
 11

12 While Plaintiff presumably disagrees with these characterizations and conclusions, she does not  
 13 provide any evidence, even her own declaration, to dispute them. Instead she argues that in the context of  
 14 a qualified immunity summary judgment motion, she does not have to establish a violation of her First  
 15 Amendment rights, and that her factual allegations – the conclusory claim that she engaged in  
 16 “constitutionally protected speech activities” – are sufficient.<sup>2</sup>  
 17

18 She apparently relies on the language used to describe the first prong of a qualified immunity  
 19 analysis: “[C]ourts must first determine whether the plaintiff has alleged the deprivation of an actual  
 20 constitutional right at all, and if so, proceed to determine whether that right was clearly established at the  
 21 time of the alleged violation.” See *Smith v. Rector and Visitors of the University of Virginia*, 78  
 22 F.Supp.2d 533, 539 (W.D.Va. 1999), quoting *Wilson v. Layne*, 526 U.S. 603 (1999).  
 23

24 This standard cannot be met by literally, and only, “alleging” that “a constitutional violation has  
 25 occurred,” without any factual support. Compare Plaintiff’s proposed Amended Complaint, Dkt. #13 at  
 26 Paragraph 4.4: “[Plaintiff] again engaged in constitutionally protected free speech activities.” If this were  
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28 <sup>2</sup>Plaintiff also argues that discovery has not commenced. But she does not necessarily require discovery to provide her own version of the facts. Plaintiff does not provide any declarations or other evidence, but relies on the allegations in her complaint.



1 all that was required to meet her burden of establishing a constitutional deprivation, then very few cases  
2 would be decided on the basis of qualified immunity. The first prong of the qualified immunity inquiry  
3 would be met by simply alleging in a complaint the “magic words” that a constitutional deprivation had  
4 occurred.  
5

6 On the evidence provided, viewed in the light most favorable to the Plaintiff, it is difficult to  
7 conclude that a constitutional violation occurred. Against Plaintiff’s conclusory claim that she was  
8 suspended in retaliation for engaging in protected speech activity is the Defendant’s evidence that the  
9 Plaintiff’s words were intimidating, threatening, intentionally false and disrespectful.  
10

11 Nevertheless, because Pearson’s qualified immunity can be decided on the second prong of the  
12 inquiry, the court will assume for purposes of this motion that Plaintiff’s allegations are sufficient to  
13 establish a deprivation her constitutional rights.  
14

15 The second inquiry is whether the right was clearly established. “The relevant, dispositive inquiry  
16 in determining whether a right is clearly established is whether it would be clear to a reasonable [actor] his  
17 conduct was unlawful *in the situation he confronted*.” *Phillips v. Hust*, 477 F.3d 1070, 1079 (9<sup>th</sup> Cir.  
18 2007)(emphasis added).  
19

20 Pearson argues that he did not personally participate<sup>3</sup> in any deprivation of rights, based on the fact  
21 that he simply presided over the Disciplinary committee’s hearing and did not otherwise participate in its  
22 decision to uphold the suspension. He argues that even if there was a constitutional violation, and even if  
23 the right was clearly established, the Plaintiff must demonstrate that a reasonable official would have  
24 known his conduct was a unlawful in the situation he confronted.  
25

26 Plaintiff provides no evidence, and no authority, for her claim that a reasonable actor would know  
27 that it was a violation to preside over a hearing held in compliance with state law, in which the Committee  
28

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<sup>3</sup>While Pearson also raises “no personal participation” as a separate basis for summary judgment, Pearson’s lack of personal participation also plays a role in the qualified immunity analysis. The court does not reach the independent defense, due to its resolution of the qualified immunity defense.

1 members voted to uphold an earlier actor's suspension. She argues that Pearson was obligated to dissent,  
2 or to inform the Committee that it was violating plaintiff's constitutional rights. Plaintiff cites no cases,  
3 and certainly no Supreme Court cases, supporting her position that a reasonable actor in Pearson's  
4 situation would have known that failing to do so violated a clearly established constitutional right.  
5

6 For these reasons, the Court concludes that Pearson is Qualifiedly Immune from plaintiff's §1983  
7 claims against him. His Motion for Summary Judgment [Dkt. #9] is therefore GRANTED and Plaintiff's  
8 claims against him are DISMISSED with Prejudice.  
9

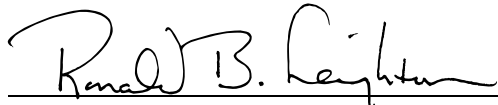
10 **5. Plaintiff's Motion for Leave to Amend her Complaint.**

11 Plaintiff seeks Leave to Amend her Complaint to clarify the first amendment claims and to delete  
12 her due process claims. The due process claims are discussed and dismissed above.

13 The Plaintiff's Motion [Dkt. #13] is GRANTED; however, that portion of the proposed amended  
14 complaint asserting claims against John Pearson personally are inconsistent with this Order shall be revised  
15 to reflect this Order. Additionally, if and to the extent Plaintiff seeks to assert additional "protected  
16 speech" constitutional claims, the content of the speech must be alleged with enough specificity for  
17 Defendants to respond.  
18

19 IT IS SO ORDERED.  
20

21 DATED this 6<sup>th</sup> day of June, 2007.  
22

23  
24 

25 RONALD B. LEIGHTON  
26 UNITED STATES DISTRICT JUDGE  
27  
28